IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1783

ELSIE OAKLEY, Individually and as Next Friend of Robert Oakley, a Minor Under the Age of 14 Years - - - - Petitioners

versus

ROGER (BOB) KNEFF - - - - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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INDEX

TABLE OF CITATIONS

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The respondent, Roger (Bob) Kneff, by and through his attorney, hereby respectfully requests that this Court deny the petitioners' Writ of Certiorari to review the judgment of the Supreme Court of the Commonwealth of Kentucky entered in this cause of February 3, 1976.

JURISDICTION

The petitioners herein assert that the judgment of this Court is invoked under 28 U.S.C. Section 1257(3). The respondent asserts that this Court is without jurisdiction on the grounds that the petitioners have not asserted that a State Court has decided a Federal ques-

tion of substance and cannot so state, for the contrary is true. Nor have the petitioners met the requirements of 28 U.S.C. Section 1257(3) on the grounds that the validity of a treaty or statute of the United States has not been drawn in question, nor has the validity of a State statute been drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, nor has any title, right, privilege of immunity been specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States. This Court is therefore without jurisdiction to entertain the matter in question as raised by the petitioners for Writ of Certiorari.

CONSTITUTIONS AND STATUTES INVOLVED

The respondent herein accepts the statement of the Constitution and statutes involved as set out in page 3 of the Petition for Writ of Certiorari, but specifically adds 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

The questions presented in the Petition for Writ of Certiorari are set out in said Petition at page 2 thereof. By the Rules of this Court, those questions may not be broadened nor may additional questions be raised. Therefore, the response to the Petition will be limited to those questions even though they are very ineptly drawn and very difficult to understand.

STATEMENT OF THE CASE

(Before beginning the statement of the case, for the purpose of reference to all citations of appropriate parts of the record, all of the record is contained in the appendix to the Petition for Writ of Certiorari and will be referred to hereafter in parenthesis by a simple reference to the letter "A" and the numbers following, of course, will be the page number.)

The petitioners have petitioned this Court for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky arising out of a trial that was held on Thursday, November 6, 1975, and continued on over until the 7th day of November, 1975. A directed verdict was granted to the defendant in the trial court below and the respondent herein, and a Trial Order and Judgment was entered pursuant to the Court's ruling that a directed verdict was proper (A. 3a-5a). This Trial Order and Judgment was filed as a matter of record on November 14, 1975. Subsequently, on November 24, 1975, the trial court below entered an Order overruling a motion and grounds for new trial filed by the plaintiffs below and the petitioners in this Court (A. 6a).

Subsequently, on the 28th day of November, 1975, the petitioners herein filed in the trial court below a Notice of Appeal to the then Court of Appeals of Kentucky, which is now designated the Supreme Court of Kentucky (A. 7a). It is to be noted at this point that the petitioners in that Notice of Appeal, appealed from the final Order of the trial court entered on November

24, 1975, *"wherein this Court overruled the motion and grounds for a new trial filed herein by plaintiffs and is basing their appeal upon the grounds as stated in said motion and grounds for a new trial."*

On the 12th day of January, 1976, the respondent herein filed in the Supreme Court of the Commonwealth of Kentucky, a motion to dismiss the appeal and cited the authorities in support thereof (A. 1a-2a).

The petitioners herein filed a motion to abate under Rule 60.04 in the Supreme Court of Kentucky and then in the trial court filed a motion for leave to correct a typographical error in the Notice of Appeal under Civil Rule 60.02(1), prior to docketing in the Court of Appeals (A. 8a, 9a). A response was then filed on behalf of the respondent herein to the petitioners' motion to abate (A. 11a-12a-13a). Additionally, the respondent in the trial court below filed a reply to the motion for leave to correct a typographical error in the Notice of Appeal (A. 14a-15a). It is obvious from the reply and from the pleadings that have been filed that there was no typographical error to correct and the grounds therefore are completely and adequately set out in the reply to the motion for leave to correct a typographical error (A. 14a). An Order was then entered denying the plaintiffs' motion to correct a typographical error (A. 17a), and a motion was filed on behalf of the respondent in the Supreme Court of Kentucky requesting that the Order be noted and further moving that the Supreme Court of Kentucky rule on the motion of the respondent in the Supreme Court of Kentucky and that the appeal be dismissed (A. 16a). The Supreme Court of Kentucky on February 3, 1976, then entered an order denying the motion of the petitioners herein to abate and sustained the motion of the respondent herein to dismiss the appeal (A. 22a).

Following this, the petitioners herein then filed a Notice of Appeal to the Supreme Court of Kentucky from the Order of the trial court denying the motion of the petitioners to correct a typographical error in their original Notice of Appeal (A. 28a). The respondent herein then filed a motion to dismiss that appeal in the Supreme Court of Kentucky (A. 23a-26a).

Following this, the petitioners then filed an ex parte motion for leave to file xerox copies in lieu of printed under R.C.A. 1.200(E) and additionally filed a Petition for Rehearing (A. 29a-36a), following which the respondent herein then filed an Objection to Ex Parte Motion for Leave to File Xerox Copies and a motion to strike the Petition for Rehearing by the petitioners, and a supplemental memorandum in support (A. 38a-44a). The Supreme Court of Kentucky then entered an Order denying the motion for rehearing, denying the motion to file xerox copies in lieu of printed brief and granting the motion of the respondent to dismiss the appeal (A. 45a-46a). It is interesting to note at this particular point that the reference of the petitioners herein to the Supreme Court of Kentucky declaring the Petition for Rehearing as being moot, is not a proper nor a correct statement of the Order of the Supreme Court of Kentucky. The only thing declared moot by the Supreme Court of Kentucky was the mo-

tion of the appellants to file xerox copies in lieu of printed briefs (A. 45a-46a).

At any rate, this Petition for Writ of Certiorari to the Supreme Court of Kentucky filed in the Supreme Court of the United States is from that Order of February 3, 1976 (A. 22a) and is not a Petition for Writ of Certiorari from that Order dismissing the second appeal by the petitioners herein as entered by the Supreme Court of Kentucky on the 17th day of March, 1976 (A. 45a-46a). Therefore, this case now before the Supreme Court of the United States on the Petition for Writ of Certioari arises out of a directed verdict that was granted to the respondent very properly by the trial court of the Kenton Circuit Court and the subsequent attempts to appeal therefrom by the petitioners herein.

ARGUMENT

I.

The Case of *Foman* v. *Davis* Is Clearly Distinguishable and Therefore Inapplicable in This Instance.

The petitioners state that the case of *Foman* v. *Davis,* 371 U. S. 178, 83 S. Ct. 227 (1962), is applicable to this situation. In that case, the U. S. Supreme Court held that the Federal Court of Appeals of the First Circuit abused its discretion in too narrowly reading the second of the two Notices of Appeal before them in that they ignored the first Notice of Appeal altogether. It is to be borne in mind that the *Foman* case arises out of a decision of the United States District

Court for the District of Massachusetts and was on appeal to the First Circuit Court of Appeals of the United States and concerned a federal matter in its entirety. Although the second Notice of Appeal was inept, the two notices taken together, sufficiently projected petitioner's intention to seek review of both the dismissal and the denial of the motion. Such intent to appeal from the dismissal, final order, was manifest and did not mislead or prejudice the respondents, as both parties did brief and argued the merits of the earlier judgment on appeal. The failure of the Court of Appeals to recognize the manifest intention of the petitioner (in not looking at the two notices together) was considered a technicality used to defeat the spirit of the Federal Rules of Civil Procedure.

Furthermore, the two notices in *Foman, supra,* as construed together, pertain to an appeal from a final order, that is the judgment dated December 19, 1960. Herein lies the pertinent distinction from the present case at Bar. The present (Oakley) petitioners' Notice of Appeal specifically and clearly refers to "the final order of this Court *entered on November 24, 1975, wherein this Court overruled the motion and grounds for new trial filed herein by plaintiffs and is basing this appeal upon the grounds as stated in said motion and grounds for new trial.*" By any reasonable interpretation of the above quoted language, the petitioners are speaking of the order of the Kenton Circuit Court that overruled plaintiffs-petitioners' motion and grounds for new trial entered November 24, 1975, and such is

not an appeal from the Trial Order and Judgment entered on November 14, 1975.

The petitioners' Notice of Appeal as mentioned above therefore does not seek an appeal from a final order nor from an appealable judgment as required by K.R.C.P. 73.03 and defined in K.R.C.P. 54.01 since the Order of November 24th does not adjudicate all of the rights of the parties.

K.R.C.P. 73-03 clearly and unequivocally provides:

> "The notice of appeal shall . . . designate the judgment or part thereof appealed from."

In construction of this rule, the Supreme Court of Kentucky has uniformly held that strict compliance therewith is required. *Hawks* v. *Wilbert,* Ky., 355 S. W. 2d 655 (1962); *Hopkins* v. *Hillard,* Ky., 444 S. W. 2d 130 (1969); *United Mine Workers of America, Dist. No. 23* v. *Morris,* Ky., 307 S. W. 2d 763 (1957); *Rose Bowl Lanes, Inc.* v. *City of Louisville,* Ky., 373 S. W. 2d 157 (1963); *T.I.M.E.—D.C., Inc.* v. *Bond,* Ky. 495 S. W. 2d 500 (1973); *Commonwealth* v. *Black,* Ky., 329 S. W. 2d 192 (1959); and *City of Louisville* v. *Christian Business Women's Club, Inc.,* Ky., 306 S. W. 2d 274 (1957); *McFerran* v. *Postal Services, Inc.,* Ky., 402 S. W. 2d 83 (1966).

In all of the above cited cases, the requirement of strict compliance with the Civil Rule is jurisdictional in nature and therefore the failure to properly so comply with the Rule dictates that the appeal be dismissed. Pursuant to the above cited authorities in the Commonwealth of Kentucky this petitioners' appeal was defi-

cient on the grounds that the Notice of Appeal failed to designate an appealable order as defined in K.R.C.P. 54.01 rendering such Notice of Appeal fatally defective and the petitioners in their attempts in the Supreme Court of Kentucky to appeal the judgment of the trial court, failed to meet the jurisdictional requirements of the Supreme Court of the Commonwealth of Kentucky. The failure of the petitioners to meet or satisfy these jurisdictional requirements laid down by the Kentucky Supreme Court, can hardly be considered as technicalities as claimed by these petitioners and therefore the doctrine of the *Foman* v. *Davis* case is inapplicable under the present facts.

In the case of *Hawks* v. *Wilbert, supra,* the then Court of Appeals of the Commonwealth of Kentucky stated at page 656 of that opinion:

> "In considering this and similar failures of counsel to follow the rules of appellate practice, the Court is confronted with many hard decisions. The choice presented is whether it is better to adhere strictly to the rules with some seemingly harsh decisions resulting, or to permit a substantial compliance when no prejudice is shown to have been occasioned by the dereliction. This problem has plagued the Court many times. However, rather than having to decide whether each dereliction is prejudicial, the Court had adopted the policy of strict compliance in the belief that the legal profession should by now be adequately informed on these rules. The necessity of strict compliance and the supporting reasons have been thoroughly discussed in the White case and in United Mine Workers of America, Dist. No. 23 v. Morris, Ky., 307 S. W. 2d

763, also decided December 5, 1957. See also Electric Plant Board v. Stephens, Ky., 273 S. W. 2d 817; Commonwealth v. Black, Ky., 329 S. W. 2d 192. Hence, the Court feels there is no reason to discuss the matter further or to depart from its policy of strict compliance.

The motion to dismiss the appeal is sustained, and the appeal is dismissed."

In the case of *United Mine Workers of America, Dist. No. 23* v. *Morris, supra,* the Court of Appeals stated at page 765 of that opinion:

> "We cannot say that rules regulating appeal procedure are mere technicalities to be enforced or relaxed upon the whim of this Court. Such rules have the force of law."

Further, at page 765 of that same opinion the Court stated:

> "Judicial administration is dependent upon procedural rules. Without a definitive method of procedure a court cannot function effectively, nor would citizens have the equal protection of the law."

This Court's attention is also called to the further very logical reasoning of the then Court of Appeals of the Commonwealth of Kentucky in deciding the issues contained in that appeal.

In the further case of *Rose Bowl Lanes* v. *City of Louisville, supra,* at page 158 of that opinion in which the appellant in that case failed to designate the judg-

ment or part thereof appealed from in his Notice of Appeal, the Court of Appeals stated:

> "Such omission on the part of the appellant seems a trifle on which to base the dismissal of an appeal, but on the other hand, it is such a simple thing to designate the judgment or part thereof appealed from as to make the failure to do so inexcusable. Fairness to those against whom the rule has been enforced strictly strengthens our resolve to retain the policy of strict compliance."

In addition to the above cited Kentucky authorities, there are also Federal authorities that have dealt with similar situations. In the case of *Higginson* v. *United States* (U.S.C.A., Sixth Circuit), 384 F. 2d 504 (1967), the Sixth Circuit Court of Appeals has before it a case involving jurisdictional requirements and had occasion to comment upon the *Foman* case, *supra.* In distinguishing that case, the Sixth Circuit Court of Appeals stated at page 510 of that opinion:

> "No such situation existed in the present case and the precise quotation of two inappropriate orders and the total omission of the critical third can scarcely be characterized as being merely 'inept.' Similarly, we recognize and are totally in accord with the portion of Foman opining that it is 'entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of * * * mere technicalities,' *but in contradistinction reiterate that we are here dealing with a jurisdictional requirement.*" (Emphasis supplied.)

Further, in the case of *Thompson* v. *Immigration and Naturalization Service* (U.S.C.A., Seventh Circuit), 318 F. 2d 681 (1963), the Seventh Circuit Court of Appeals interpreted the *Foman* case and found it to be clearly distinguishable. In that case at page 684 the Seventh Circuit Court of Appeals stated:

> "In the instant case the notice of appeal was not timely filed as were the notices of appeal in Foman, and this Court has no jurisdiction to determine this appeal on the merits. Furthermore, in the instant case the sufficiency of appellant's petition for naturalization was never involved, and Rule 15(a) is not applicable. Foman is simply not in point here."

In still a further case, *Fisher* v. *Indiana Lumberman's Mutual Insurance Company* (U.S.C.A., Fifth Circuit), 456 F. 2d 1396 (1972), again the case of *Foman* v. *Davis* was clearly distinguished. In the case of *Troxel Manufacturing Company* v. *Schwinn Bicycle Company* (U.S. C.A., Sixth Circuit), 489 F. 2d 968 (1973), the Sixth Circuit Court of Appeals again clearly distinguished the *Foman,* case. See also *Suehle* v. *Markem Machine Company* (U.S.D.C. E.D. Pa.), 38 F.R.D. 69 (1965).

Therefore, the situation that exists in the case at bar is one in which the petitioners herein have very clearly failed to meet the jurisdictional requirements as laid down by the Commonwealth of Kentucky Supreme Court. Their failure to do so, very clearly justified a dismissal of the appeal. It is equally clear that there have been no violations of the rights of the plaintiffs-appellants-petitioners herein on the grounds of

unequal protection under the law, but that the contrary is true. The equal rights under the law are very clearly protected by an equal enforcement of the law as to all parties.

II.

This Court Is Without Jurisdiction to Entertain the Within Cause.

As pointed out previously under the subject head of "jurisdiction," this Court is without the necessary statutory requirements in order to be able to entertain this particular cause. In addition to that, this Court has repeatedly held that where a Petition for Writ of Certiorari is sought from a judgment of a State Court, and that State Court judgment is in reliance upon non-Federal grounds, then the Supreme Court is without jurisdiction to entertain the matter. See *Durley* v. *Mayo,* 351 U. S. 277, 76 Supreme Court Reporter 806 (1956); *Stembridge* v. *State of Georgia,* 343 U. S. 541, 72 Supreme Court Reporter 834 (1952).

In the *Durley* case, *supra,* the Supreme Court of the United States held that in order for a petitioner to establish jurisdiction, he must demonstrate that neither of the State grounds relied upon by the lower court of Florida in that particular case can account for the decision of that lower court. And, further held, and I quote from the opinion at page 809:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." Citing the *Stembridge* case, *supra.*

Further, at that same page of the *Durley* opinion, this Court stated:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U. S. 14, 18, 57 S. Ct. 350, 352, 81 L. Ed. 476; Lynch v. [People of] New York [ex rel. Pierson], 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. [State of] Missouri, 13 Wall. 257, 263, 20 L. Ed. 635; [Walter A.] Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293, 297, 11 S. Ct. 528, 530, 35 L. Ed. 193; Allen v. Arguimbau, 198 U. S. 149, 154-155, 25 S. Ct. 622, 624, 49 L. Ed. 990; Lynch v. [People of] New York [ex rel. Pierson] supra."

In the instant case we have a defective Notice of Appeal filed on behalf of the petitioners. The lower court decided that this Notice of Appeal was defective because it did not face the strict compliance requirement of the Supreme Court of Kentucky as we have set out above. These petitioners are petitioning this Court for a Writ of Certiorari arising out of that order denying their motion to abate and dismissing the appeal, said order being dated February 3, 1976 (A. 22a).

The only time that any Federal question was even presented was in the Petition for Rehearing filed on behalf of these petitioners in the Supreme Court of Kentucky below (A. 30a-36a). Since this is an appeal from that order of February 3, 1976, obviously the decision of the Supreme Court of Kentucky cannot and was not in reliance upon any Federal question whatsoever, but was rather in reliance upon the strict compliance requirement of the Supreme Court of Kentucky requiring all people filing a Notice of Appeal in that Court to strictly comply with Rule 73.03 and the cases cited thereunder. This respondent by no means is admitting that a Federal question has been raised by that Petition for Rehearing filed by the appellants in the Supreme Court of Kentucky. As a matter of fact, I think that if this Court were to review that Petition for Rehearing as it is constituted, you will see that no real Federal issue was ever raised prior to the decision, of course, of February 3, 1976, but even in the Petition for Rehearing, no Federal question was raised, as it was merely a very inept attempt on the part of petitioners' attorney to try to assert something new into this particular law suit. But, the issue was as a matter of fact quite moot since the order appealed from is one in which there was never an issue concerning a Federal question whatsoever. Therefore, this Court is totally without jurisdiction to entertain the within matter.

CONCLUSION

It is therefore respectfully requested that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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